SUPREME COURT, U. S.

JUL 5 1967

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19...

No. 329

OVE SKOU REDERI A/S, a Corporation, and the SS BIRGITTE SKOU, Her Engines, Hull, Tackle, Cargo, and Appurtenances Thereof,
Petitioners,

versus

JOHN L. MARSHALL,
Respondent,
THE TRAVELERS INSURANCE COMPANY, a Corporation,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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STATEMENT OF MATTER INVOLVED.

This petition seeks certiorari from the Supreme Court of the United States to reverse a decision of the United States Court of Appeals for the Fifth Circuit which is in conflict with the decisions of this Court and with the decisions of the United States Courts of Appeals for the First, Second, Third, Fourth and Ninth Circuits. By a

split decision in the Court below the Court of Appeals reversed a finding by the Trial Court, sitting in Admiralty, that Petitioner's vessel was seaworthy on March 23, 1964, when the Respondent, a longshoreman in the employ of Cooper Stevedoring Company, Inc., was injured while working in the Number 5 hold of Petitioner's vessel, the SS BIRGITTE SKOU while said vessel was docked at the Alabama State Docks in the Port of Mobile, Alabama.

The accident out of which this case arose occurred while construction steel, which was destined for the fabrication of an aluminum plant in Dutch Guiana, was being loaded aboard the vessel and such steel was in different sizes, shapes and of different weights. Work was begun at 8:00 o'clock on the morning of March 23, 1964, and continued until approximately 1:30 o'clock P. M. when this accident occurred, with the exception of one-half hour off for lunch, and following the accident the work continued without any change whatever in the loading operation. At the time of this accident a large H-beam measuring approximately two feet by one and a half feet by forty feet and weighing approximately two and a half tons was being loaded into the Number 5 hold of the vessel at an angle of approximately 45 degrees, as the beam was too long to be loaded in a horizontal attitude.

All of the vessel's gear was in good working condition but for some unknown reason, the large H-beam in question slipped out of the chain sling by which it was suspended, landed upon one end of steel which had already been stowed in the hold of said vessel while the Respondent was standing on the other end of such steel and he was thereby injured.

Similar beams had been loaded aboard said vessel without incident before said accident with the same gear and after the occurrence of said accident the loading opera-

tion was continued with the same chain sling without any adjustments or changes being made in the loading procedure or in the vessel's equipment. Such chain slings are still in use by Cooper Stevedoring Company and similar chain slings have been used for the handling of such large steel beams by stevedores in the Port of Mobile for more than thirty years.

Although many other beams of the same type, size and weight as the one which fell were loaded aboard the vessel without incident both prior to and after the occurrence of this accident and although many of these steel ships have been loaded at the Port of Mobile over a period of many years, this was the first time that such a steel beam ever fell from a chain sling, although some had fallen from wire cable slings.

At the conclusion of the trial of this case in the United States District Court for the Southern District of Alabama, that Court, after hearing all of the evidence, observing a chain sling of the type in use at the time of this accident and observing all of the witnesses, concluded that the chain sling in question was reasonably fit for the purpose for which it was being used at the time of this accident and Respondent's libel was dismissed.

In reversing the Trial Court the majority opinion of the United States Court of Appeals for the Fifth Circuit held, in effect, that whether the vessel's equipment was in good and proper working order; whether other steel beams of the type in question had been loaded with the same gear both before and after this accident without incident or whether such chain slings were the customary equipment for loading such steel were immaterial and found Petitioner's vessel unseaworthy simply because, on the one occasion in question, one beam, for some unexplained reason, fell from said sling.

JURISDICTION.

This case was tried in the United States District Court for the Southern District of Alabama, before the Honorable Daniel H. Thomas, United States District Judge sitting in Admiralty. The style of this case in the Trial Court was John L. Marshall, Libellant v. Ove Skou Rederi A/S, a Corporation, and the SS BIRGITTE SKOU, Her Engines, Hull, Tackle, Cargo and Appurtenances Thereof, Respondents—The Travelers Insurance Company, a corporation, Intervenor, and the case was docketed as that Court's Admiralty Action Numbered 3112. By decree dated October 27, 1965, the Trial Judge made his Findings of Fact and Conclusions of Law and found that the Libelant should take nothing in such proceeding. Such decision of the Trial Court is reported in 246 Fed. Supp. 703, and a copy of the Trial Court's opinion is appended hereto as Appendix A.

From the adverse ruling in the District Court, Libelant appealed to the United States Court of Appeals for the Fifth Circuit where this case was styled John L. Marshall, Appellant v. Ove Skou Rederi A/S, a Corporation, and the SS BIRGITTE SKOU, Her Engines, Hull, Tackle, Cargo and Appurtenances Thereof, Appellees—The Travelers Insurance Company, a Corporation, Intervenor, and bore that Court's docket number 23,295. On appeal the case was argued before Judges Richard T. Rives, Walter P. Gewin and John C. Godbold. In opinions dated May 15, 1967, Judges Godbold and Rives reversed and remanded the case to the Trial Court for determination of damages, but there was a strong dissent written by Judge Gewin. A copy of the opinion of the Court of Appeals is appended hereto as Appendix B and has not yet been reported.

A copy of the judgment of the Court of Appeals is appended hereto as Appendix C, and a copy of the order

of the Court of Appeals dated June 5, 1967, staying its mandate, is appended hereto as Appendix D.

Jurisdiction in this case is based upon two provisions of Rule ~~38~~ 19, Section ~~5~~ 1 (b) of this Court, namely, that the United States Court of Appeals for the Fifth Circuit has, in this case, decided a Federal question in a way ~~probably~~ in conflict with applicable decisions of this Court and has rendered a decision in conflict with the decisions of the United States Courts of Appeals for the First, Second, Third, Fourth and Ninth Circuits on the same matter.

The majority opinion of the Fifth Circuit in our instant case, in effect, holds vessel owners to be insurors of the safety of persons working aboard their vessels. On page 19 of the opinion of the Court of Appeals for the Fifth Circuit, Judge Gewin, in his dissent, said as follows:

> "Its decision is tantamount to holding that if an accident occurs which can not be satisfactorily attributed to an exculpatory cause, the ship is unseaworthy as a matter of law."

In the majority opinion Judge Godbold said at pages 3 and 4 of the opinion as follows:

> "All the evidence was that the gear other than the sling was in good order and properly used and operated and the load which fell was not jerked or mishandled.
>
> • • • • • • • •
>
> "Earlier in the day, and after the accident also, beams of the same general size and type were loaded in the same manner without falling from the sling;
>
> • • • • • • • •
>
> "Since the accident (March, 1964) and to the time of trial (August, 1965) the same chain straps were in use loading steel onto other ships without incident;
>
> • • • • • • • •

"On the record the finding of fact by the trial court that the use of a chain sling was customary is not clearly erroneous."

Further on, at page 9 of the opinion, Judge Godbold said as follows:

"But this accident occurred under the most antiseptic conditions possible. The winch was operated properly. The load struck nothing. The sling did not break. No new agency affected the sling. The loading operation was done without negligence. The sling simply did not perform its single assigned purpose of retaining the load without dropping it while moving it from point A to point B."

On page 18 of the opinion Judge Rives in concurring with Judge Godbold said as follows:

"There is simply no explanation for the accident, except either the choice of an improper method of loading or the unfitness of the sling used to lower the beam. Under the principles established in the Second Circuit and in this Circuit, I agree that the necessary conclusion is that unseaworthiness of the ship caused the injury to Marshall. I therefore concur."

The Fifth Circuit in this case has found Petitioner's vessel to have been unseaworthy, not on the basis of any defect in its gear, but because such gear in one isolated instance failed to hold the particular beam in question. If this is the law, then the vessel owner was an insuror of the safety of Respondent. The Fifth Circuit has held in this case that the mere fact that one of the large steel beams being loaded aboard this vessel slipped from the sling, although for some unexplained reason, will support a finding that the vessel's gear was inadequate. The Supreme Court of the United States and the United States Court of Appeals for the First, Second, Third, Fourth and

Ninth Circuits have held that a vessel is not unseaworthy simply because an accident occurs aboard same, but it must be established that an unseaworthy condition of the vessel was the cause of such accident. We submit that in this case the Fifth Circuit has put the cart before the horse whereas the other Courts mentioned above have kept this matter of seaworthiness in its proper perspective.

Judge Gewin in his dissent said, at page 20 of the opinion in our instant case, as follows:

> "No defect in the equipment here involved was shown by libelant and none is inferrable from the facts disclosed in the record."

The majority opinion of the Fifth Circuit in our instant case does away with the necessity of any finding that the gear was defective.

In the case of **Mitchell v. Trawler Racer, 362 U. S. 539,** at **page 550, 5 L. Ed. 2d 941, 80 S. Ct. 926,** decided by the Supreme Court of the United States on May 16, 1960, this Court in an opinion by Justice Stewart, said as follows:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but **it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.** Boudoin v. Lykes Bros. S. S. Co., 348 U. S. 336, 99 L. ed. 354, 75 S. Ct. 382." (Emphasis supplied.)

The majority opinion of the Fifth Circuit in our instant case is in conflict with such statement of this Court, as such majority opinion does use perfection as the standard.

Decisions of the United States Court of Appeals for the Ninth Circuit are directly in conflict with the instant case and a case directly in point with our instant case in **Phipps v. N. V. Nederlandsche Amerikaansche, S. M., 259 F. 2d 143**, decided by the United States Court of Appeals for the Ninth Circuit on August 21, 1958. The facts in that case appear in the opinion at **page 144** as follows:

> "At Portland, Oregon, on June 11, 1954, appellant Phipps was working as a hold man in a longshore gang in the employ of W. J. Jones & Sons, Inc., who was loading the vessel under contract with appellee. Phipps was working at the bottom of a hold into which timbers of varying lengths up to 40 feet were being lowered. These timbers approximately 3" x 6" in size, bound together, by means of a sling, in bundles of 18-20 were being loaded into the hold of the ship. The on-deck-hatch-opening being twenty foot square, it was necessary to slant at an angle to permit lowering. The slanting was accomplished by fixing a single sling to the load a few feet off center. This was the sole binding or apparatus used to secure the timbers in one bundle. The hold being some 35 to 40 feet in depth, the timbers were touching bottom as they cleared the hatch coaming. At the bottom of the hatch the timbers were placed on rollers and conveyed into the hold proper which was a tunnel running from the shaft entrance to the space in which the timbers were stored. While Phipps was in the process of storing a prior load and working some 6 feet from the shaft proper a new load was being lowered. A timber from the load slipped from its binder and struck Phipps in the foot, inflicting serious injury."

In affirming the action of the Trial Court in directing a verdict in favor of the vessel owner in that case the Court said, at **page 144**, as follows:

> "It does not appear that the fall of the lumber was the result of imperfections in the ship's equipment or its appurtenances; the loading operation continued after the accident in the same manner with the same equipment and without any repair thereto. The issues of negligence and unseaworthiness as alleged by appellant boil down to a determination of whether the ship was unseaworthy or that the owner was negligent, or both, by reason of the fact that the owner directed and permitted the timber to be lowered into the particular hold that was used in that it created an unsafe place to work. At the close of all the evidence the trial court directed a verdict in favor of appellee on the theory that the evidence established without contradiction that the ship was seaworthy and that the owner was not negligent." (Emphasis supplied.)

The following language also appears in the opinion, at page 145:

> "The shipowner has no burden of an insurer and is not required to provide an accident proof ship. Freitas v. Pacific-Atlantic Steamship Co., 9 Cir., 1955, 218 F. 2d 562. See also Titus v. The Santorini, 9 Cir., 1958, 258 F. 2d 352" (Emphasis supplied).

In conclusion, the Court said, on page 146, as follows:

> "Unseaworthiness cannot be extended to the point of holding the owner liable in a case where he contracted for the loading of a customary cargo in a customary way, no failure of the ship's gear being shown and no showing that what was customary was not reasonable, but simply and solely on the basis that an accident occurred" (Emphasis supplied).

The Ninth Circuit also, in the case of **Billeci v. United States, 298 F. 2d 703**, at page 705, said as follows:

"On the other hand, while the duty is absolute, it is a duty only to furnish a vessel and appliances reasonably fit for their intended use; **the law does not impose upon the shipowner the burden of an insurer or the duty to provide an accident-proof ship**" (Emphasis supplied).

In the case of **Nunes v. Farrell Lines, 227 F. 2d 619,** at **page 622,** the United States Court of Appeals for the First Circuit, in quoting from an earlier case, said as follows:

" 'Though shipowners are held to a strict degree of diligence, **seaworthiness does not require absolute perfection,** nor are owners held to the duty of furnishing appliances having the highest known degree of safety. It is sufficient if the equipment be that which is reasonably fit and safe for its purpose, and reasonably adequate to the place and occasion where used by direction of the owners * * *' " (Emphasis supplied).

Also, in the case of **Doucette v. Vincent, 194 F. 2d 834,** at **pages 837 and 838,** the Court of Appeals for the First Circuit said as follows:

"The best or the safest appliances are therefore not required, but only those which are reasonably suitable and adequate for the purpose.

* * * * * * *

"Nor is perfection required of shipowners by the maritime law of seaworthiness for generally stated it is the shipowner's duty under that law to provide a vessel sufficient, that is reasonably adequate, in materials, construction, equipment, stores, officers, men and outfit for the trade or service in which the vessel is employed" (Emphasis supplied).

In the case of **Manhat v. United States, 220 F. 2d 143,** at **page 148,** the United States Court of Appeals for the Second Circuit said as follows:

"Although the doctrine of seaworthiness which is said to impose a warranty on the shipowner that the ship, its equipment and appliances are not defective has, in recent years, been extended to include within the scope of the warranty such things as appliances brought on board by an independent contractor to be used by him in repairs aboard ship, Alaska S. S. Co., Inc. v. Petterson, supra, and the adequacy and competency of its crew, Overseas Tankship Corp. v. Keen, 2 Cir., 1952, 194 F. 2d 515, certiorari denied 1952, 343 U. S. 966, 72 S. Ct. 1061, 96 L. Ed. 1363, **it has never been held to require the best possible equipment or to impose an insurer's liability for any and all injury to those working on shipboard,** Berti v. Compagnie De Navigation Cyprien Fabre, 2 Cir., 1954, 213 F. 2d 397; see Doucette v. Vincent, 1 Cir., 1952, 194 F. 2d 834." (Emphasis supplied.)

In the case of **Walker v. Sinclair Refining Co., 320 F. 2d 302, at page 304,** the United States Court of Appeals for the Third Circuit said as follows:

"**While the ship and her owners are not insurers of the safety of seamen working on board,** it is sufficient if she is reasonably fit for the purposes intended. Boudoin v. Lykes Brothers S. S. Co., 348 U. S. 336, 75 S. Ct. 382, 99 L. Ed. 354; Poignant v. United States, 2 Cir., 225 F. 2d 595; Doucette v. Vincent, 1 Cir., 194 F. 2d 834. The rationale of this doctrine is that seaworthiness of the ship, her equipment and appurtenances, is a relative concept depending in each instance upon the circumstances upon which her fitness is related to. As was said in Lester v. United States, 2 Cir., 234 F. 2d 625, 628, the crucial consideration is whether the ship was, in all respects pertinent to the injury, **reasonably** fit to permit

plaintiff to perform his task aboard the ship with **reasonable** safety." (Emphasis supplied.)

In the case of **Ross v. Steamship Zeeland, 240 F. 2d 820,** at **page 822,** the United States Court of Appeals for the Fourth Circuit said as follows:

> "**But the ship and her owners are not insurers of the safety of men working on board.** Jones v. Gould Steamships & Industrials, Ltd., D. C. D. Md., 300 F. 109, affirmed 4 Cir., 10 F. 2d 792. A vessel does not need to be free from all cause for mishap; it is enough if she is reasonably fit. Boudoin v. Lykes Bros. S. S. Co., 348 U. S. 336, 75 S. Ct. 382, 99 L. Ed. 354; Poignant v. U. S., 2 Cir., 225 F. 2d 595; Doucette v. Vincent, 1 Cir., 194 F. 2d 834." (Emphasis supplied.)

The majority decision of the Fifth Circuit in our instant case is also in conflict with applicable decisions of this Court as such majority opinion reverses the Trial Court's finding of seaworthiness without holding that such finding was clearly erroneous.

In the case of **McAllister v. United States, 348 U. S. 19,** at **page 20, 99 L. Ed. 20,** at **page 24,** this Court said as follows:

> "In reviewing a judgment of a trial court, sitting without a jury **in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous.** No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. Boston Ins. Co. v. Dehydrating Process Co., 204 F. 2d 441, 444 (C. A. 1st Cir.); C. J. Dick Towing Co. v. The Leo, 202 F. 2d 850, 854 (C. A. 5th Cir.); Union Carbide & Carbon Corp. v. United States, 200 F. 2d 908, 910 (C. A. 2d Cir.); Koehler v. United States, 187 F. 2d 933, 936 (C. A. 7th Cir.);

Walter G. Hougland, Inc. v. Muscovalley, 184 F. 2d 530, 531 (C. A. 6th Cir.), cert. den. 340 U. S. 935, 95 L. Ed. 675, 71 S. Ct. 490; Petterson Lighterage & Towing Corp. v. New York Cent. R. Co., 126 F. 2d 992, 994, 995 (C. A. 2d Cir.)" (Emphasis supplied.)

We submit that in addition to the conflicts mentioned above, jurisdiction in this case also rests on the conflict between the Fifth Circuit and this Court's decision in **McAllister v. United States,** supra.

There is a most substantial question at issue in our instant case. If the majority opinion of the Fifth Circuit is allowed to stand, then from now on an injured longshoreman need only show, in order to recover damages, that in the loading or unloading of a vessel, cargo fell. There will be no necessity to show that such cargo fell because of some defect in the vessel's equipment which made the vessel unseaworthy as the very fact that cargo fell will in and of itself constitute the vessel unseaworthy.

We are here concerned with a drastic change in our admiralty law which will have a far reaching effect on an industry which is already heavily burdened with implications of the doctrine of unseaworthiness which imposes liability without fault on vessel owners. Are vessel owners now to be further burdened with a doctrine which places upon them the additional obligation of insuring the safety of all persons working aboard their vessels?

QUESTIONS PRESENTED.

I.

Will the mere fact that one large steel beam fell from the cargo sling of a vessel for some unexplained reason constitute such vessel unseaworthy where similar beams were loaded aboard said vessel with the same gear, with-

out incident, both prior to and subsequent to such accident, the use of such gear being customary and without any defect therein?

II.

Where a vessel's gear was adequate to handle large, heavy steel beams both before and after an incident in which, for some unexplained reason, one of such beams fell, is the finding of the Trial Court that such gear was seaworthy at the time such beam fell clearly erroneous in the absence of any evidence of any change in the vessel's gear or in the cargo being handled at the time of such incident from the situation existing both prior to and subsequent to such incident?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

On the trial of this case in the District Court Libelant sought to persuade the District Judge that the vessel's gear was unseaworthy in that the steel beams in question were being handled by steel chain slings rather than steel wire cables and that no wood chocks were being used. No effort was made by Libelant to seek recovery under the theory set forth by Judge Godbold in his opinion in the Fifth Circuit that Libelant was entitled to recover simply because one beam fell. Counsel for Libelant recognized that he had the burden of proof to show, at least by inference, that the beam fell because of some defect in the vessel's gear and in attempting to supply necessary proof of such defect, Libelant offered evidence in support of both of his two theories as to what caused the beam to fall, namely the use of steel chain slings rather than the use of wire cables and the failure to use wood chocks. The District Court, however, found that the vessel's gear was seaworthy and we submit that this

was a correct finding, and in any event such finding was not clearly erroneous.

The case of **Phipps v. N. V. Nederlandsche Amerikaansche, S. M.** supra, is directly in point with our instant case. The pertinent facts are quoted above under Petitioners' statement regarding jurisdiction. The only difference in the facts in the **Phipps** case and in our instant case is that in the former, several forty-foot timbers were being loaded at one time, whereas in our instant case only one forty-foot steel beam was being loaded aboard the vessel. In the **Phipps** case one of the timbers fell for some unexplained reason and in our instant case the large steel beam fell for some unexplained reason. We submit that it is most significant that the Ninth Circuit in the **Phipps** case felt it necessary to state that the fall of the lumber in that case was not the result of imperfections in the vessel's equipment or appurtenances. We submit that the **Phipps** case and the majority opinion of the Fifth Circuit in our instant case cannot be reconciled, and that one of them is wrong.

The **Phipps** decision can be justified by pointing out that the plaintiff in that case simply failed to meet the burden of proof which was upon him to point to some defect in that vessel's gear which caused the timber to fall. The majority decision of the Fifth Circuit in our instant case cannot be justified on any theory other than that the vessel owner was an insuror of the safety of the Libelant, as no attempt is made by the majority opinions to point out any defect whatever in the vessel's gear.

Also, in the **Phipps** case the Court of Appeals for the Ninth Circuit stated that the loading operation of the lumber continued after the accident in the same manner with the same equipment and without any repair thereto. In our instant case it was clearly established and recognized by the Fifth Circuit that similar beams to the one which

fell were loaded aboard Petitioners' vessel without incident both before and after this accident; that the vessel's gear and the method of loading the large steel beam in question was customary and that no changes whatever were made in the gear or loading operation subsequent to this accident.

In our presentation regarding this Court's jurisdiction in this case, we have cited several authorities holding that vessel owners are not insurors of the safety of persons working aboard their vessels and without reiterating same, we do wish to again direct this Court's attention to such authorities. By way of emphasis, however, we do adopt a statement made by the Court of Appeals for the Fifth Circuit in the case of **Robert Morales, et al. v. City of Galveston, et al., 291 F. 2d 97, at page 98,** which reads as follows:

> "The question of unseaworthiness being a question of fact, it cannot be said, under the facts of this case, that the district judge's finding, that unseaworthiness was not present here, may be set aside as clearly erroneous. **Indeed, to hold liability in this case is to make the respondent an insurer, and this, as all the cases hold, cannot be done."** (Emphasis supplied.)

The **Morales** case was affirmed by this Court in **370 U. S. 165, 8 L. Ed. 2d 412, 82 S. Ct. 1226.**

Judge Godbold, in his opinion in our instant case, cites several cases involving the failure of equipment of vessels, but we submit that these do not support his position as in our instant case there was no failure of any of the vessel's equipment.

If the chain sling in our instant case had broken, even though for some unexplained reason, this would have supported a finding of unseaworthiness, but no part of the vessel's gear failed in any respect. To say that the

vessel's gear failed to hold the steel beam in question and that this constituted a failure of the vessel's equipment completely does away with the standard of reasonable fitness and substitutes therefor a standard of absolute perfection. We submit that this is not law and that the majority decision of the Fifth Circuit should be reversed.

II.

In the case of **Mahnich v. Southern S. S. Co., 321 U. S. 96, at pages 98 and 99, 88 L. Ed. 561, at page 564,** this Court said as follows:

> "**A finding of seaworthiness is usually a finding of fact.** Luckenbach v. McCahan Sugar Ref. Co., 248 U. S. 139, 145, 63 L. ed. 170, 174, 39 S. Ct. 53, 1 A. L. R. 1522; Steel v. State Line S. S. Co., L. R., 3 App. Cas. 72, 81, 82, 90, 91, 4 Eng. Rul. Cas. 697. Ordinarily we do not, in admiralty, more than in other cases, review the concurrent findings of fact of two courts below. The Carib Prince (Wuppermann v. The Carib Prince), 170 U. S. 655, 658, 42 L. ed. 1181, 1185, 18 S. Ct. 753; The Wildcroft (W. J. McCahan Sugar Ref. Co. v. The Wildcroft), 201 U. S. 378, 387, 50 L. ed. 794, 796, 26 S. Ct. 467; Luckenbach v. McCahan Sugar Ref. Co., 248 U. S. 139, 63 L. Ed. 170, 39 S. Ct. 53, 1 A. L. R. 1522, supra; Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 13, 65 L. ed. 97, 102, 41 S. Ct. 1; Just v. Chambers, 312 U. S. 383, 385, 85 L. ed. 903, 905, 61 S. Ct. 687." (Emphasis supplied.)

In the case of **McAllister v. United States, 348 U. S. 19, at page 20, 99 L. Ed. 20, at page 24,** this Court said as follows:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may

not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure. Boston Ins. Co. v. Dehydrating Process Co., 204 F. 2d 441, 444 (C. A. 1st Cir.); C. J. Dick Towing Co. v. The Leo, 202 F. 2d 850, 854 (C. A. 5th Cir.); Union Carbide & Carbon Corp. v. United States, 200 F. 2d 908, 910 (C. A. 2d Cir.); Koehler v. United States, 187 F. 2d 933, 936 (C. A. 7th Cir.); Walter G. Hougland, Inc. v. Muscovalley, 184 F. 2d 530, 531 (C. A. 6th Cir.), cert. den. 340 U. S. 935, 95 L. Ed. 675, 71 S. Ct. 490; Petterson Lighterage & Towing Corp. v. New York Cent. R. Co., 126 F. 2d 992, 994, 995 (C. A. 2d Cir.)." (Emphasis supplied.)

In the case of **Morales v. City of Galveston,** supra, the Court of Appeals for the Fifth Circuit said at **page 98** of the opinion as follows:

> **"It is settled law that whether a vessel is, or is not, seaworthy, is ordinarily a question of fact for the trier of the facts to determine.** * * * The question of unseaworthiness being a question of fact, it cannot be said, under the facts of this case, that the district judge's finding, that unseaworthiness was not present here, may be set aside as clearly erroneous." (Emphasis supplied.)

The **Morales** case was affirmed by this Court in **370 U. S. 165, 8 L. Ed. 412, 82 S. Ct. 1226.**

In our instant case the District Court found the vessel's gear to be reasonably fit for its intended use, which is the standard of seaworthiness reiterated by this Court in **Mitchell v. Trawler Racer,** supra. Under this Court's decisions in **Mahnich** and **McAllister,** supra, and others,

the Fifth Circuit should have found whether or not the Trial Court's finding of seaworthiness was clearly erroneous. However, by adopting the standard of perfection rather than the standard of reasonable fitness reiterated by this Court in **Mitchell v. Trawler Racer,** supra, the majority decision of the Fifth Circuit avoided the real issue in this case.

Making the vessel owner an insuror not only throws out the test of reasonable fitness, but also throws out the clearly erroneous rule laid down by this Court.

We respectfully submit that the majority decision of the Fifth Circuit is contrary to the law of this Court and to the law established by the other United States Courts of Appeal; that the District Court's decision is consistent with the applicable admiralty authorities; that the District Court's finding of seaworthiness is not clearly erroneous and should be reinstated.

CONCLUSION.

We submit that the Fifth Circuit should not effect such a drastic change in our established admiralty law and strongly urge this Court to review this case and pass upon these questions of great import not only to the parties in this case, but to the entire maritime industry.

Respectfully submitted,

Robert F. Adams

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Proof of Service.

I, Robert F. Adams, attorney for the Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of July..., 1967, I served a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on John L. Marshall, Respondent herein, by mailing a copy of the same in a duly addressed envelope, with first class postage prepaid, to Hon. Ross Diamond, Jr., attorney for the Respondent, at his office address, 610 Van Antwerp Building, Mobile, Alabama, 36602.

Robert F. Adams

Robert F. Adams,
P. O. Box 1988,
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Counsel for Petitioners.

APPENDIX A.

In the United States District Court
For the Southern District of Alabama.

John L. Marshall, Libelant, versus Ove Skou Rederi A/S, a Corporation, and the SS Birgitte Skou, Her Engines, Hull, Tackle, Cargo, and Appurtenances Thereof, Respondents, The Travelers Insurance Company, a Corporation, Intervenor.	In Admiralty. No. 3112.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This libel is brought to recover damages for personal injuries sustained by libelant, a longshoreman. The injury occurred when a structural steel beam slipped from its sling while being loaded into the hold of the S. S. Birgitte Skou.

Findings of Fact.

1. On March 23, 1963, libelant was a member of a work gang employed by the Cooper Stevedoring Co. for the loading of the S. S. Birgitte Skou in the Port of Mobile. The vessel was docked in navigable waters, and within the admiralty and maritime jurisdiction of this court.

2. The cargo being loaded was structural steel of various shapes and sizes. The beam that fell was described

as an "I" beam, thirty to forty feet long and weighing approximately two tons.

3. The beams were loaded by means of a sling attached to a crane. The sling was constructed of cable and chains. The cable extended from the crane and had a steel ring attached to the end. From the steel ring there extended two cables, each of which was approximately five feet in length. At the end of each cable a six-foot chain was attached. Hooks were fastened to the free ends of the chain.

4. The beam which fell was too long to permit lowering into the hold on a parallel. An angular descent was effected by wrapping one chain twice around the high end of the beam while taking a single turn around the lower end with the other chain.

5. There was no evidence of external force striking the beam in the process of its descent, nor was there evidence of negligence on the part of the crane operator.

6. The libelant was working in the hold when the beam slipped from the grip of the sling and fell into the hold. The beam struck another beam on which the libelant was standing, and caused his right ankle joint to be fractured on account of the upward motion of the struck beam.

7. Expert testimony differed on the question of whether an all-cable sling would have resulted in a stronger grip on the beam. The evidence revealed that the chain type sling is still in use and no similar incident has occurred.

Conclusions of Law.

A ship owner is under an absolute non-delegable duty to furnish to the longshoreman a safe and seaworthy vessel. *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946). The requirement of seaworthiness is satisfied by furnish-

ing those appliances which are reasonably suitable and adequate for the purpose. The best or safest appliances are not required. *Doucette v. Vincent*, 194 F. 2d 834 (1st Cir. 1952). The law does not impose upon the shipowner the burden of an insurer or the duty to provide an accident-proof ship. The standard is not perfection but reasonable fitness. *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539 (1960); *Billeci v. United States*, 298 F. 2d 703 (9th Cir. 1962).

The chain slings in use on the S. S. Birgitte Skou can not therefore be considered unseaworthy in light of the current standards. The equipment used was customary in this operation. The proof did not show that what was customary was not reasonable. *Phipps v. N. V. Nederlandsche Amerikaansche, S. M.*, 259 F. 2d 143 (9th Cir. 1958).

The court finds that the libelant should take nothing in this proceeding.

Decree to be entered accordingly.

Dated this the 27th day of October 1965.

(Signed) Daniel H. Thomas,
District Judge.

APPENDIX B.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 23295.

John L. Marshall,
Appellant,

versus

Ove Skou Rederi A/S, and the SS Brigitte Skou, her engines, hull, tackle, cargo, and appurtenances thereof,
Appellees,

The Travelers Insurance Company,
Intervenor.

Appeal from the United States District Court
for the Southern District of Alabama.

(May 15, 1967.)

Before Rives, Gewin and Godbold, Circuit Judges.

Godbold, Circuit Judge: Appellant John L. Marshall, a longshoreman, filed a libel against the *SS Brigitte Skou* and her owner[1] to recover damages for personal injuries sustained on board the vessel during loading of cargo at Mobile. The United States District Court for the Southern District of Alabama found that the equipment used in the loading operation was not shown to be unseaworthy.

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[1] The stevedore (Cooper Stevedoring Company) was impleaded and its insurer (Travelers Insurance Company) intervened. The impleading petition was subsequently dismissed on motion of the ship, but the stevedore's insurer remains in the action.

Marshall, an employee of a stevedoring company, was a member of a gang loading structural steel of varying size, shapes and weights into a hold of the ship by derrick. He was hurt in the loading of a painted steel H-beam or I-beam, measuring approximately 2 feet by 1½ feet by 40 feet and weighing 2 to 2½ tons. Its length was such that it could not be brought into the hold in a horizontal position, so it was picked up at an angle of 40° to 60° and "dived" into the hold at that angle. When it was in position over the hold and the winch reversed the beam fell from the cargo sling into the hold and struck another beam. Marshall, who was standing on the struck beam but under the bulkhead rather than underneath the hold opening, was thrown into the air by the impact, injuring his right ankle joint.

There were no allegations of negligence. The sole issue was seaworthiness of the cargo sling.

The sling consisted of two straps leading off a single ring, the first five to six feet of each made of wire cable and the last six or eight feet of steel chain. A hook was attached to the free end of each chain. The angular position of the beam for descent into the hold was effected by wrapping one chain twice around one end of the beam and carrying its hook back to the chain, and taking a single turn of the second chain at the other end and connecting its hook back to the chain. The derricks of the vessel were rigged at such angle that the load could be brought in without striking any part of the vessel.

Appellant claimed unseaworthiness in two respects: (1) That the chain straps used to form the sling were not fit and suitable for the job to be performed. There was no contention that the chains were defectively manufactured or deteriorated or that they broke in use. (2) That wood chocks or dunnage should have been available and used between the chains and the load to help create traction.

All the evidence was that the gear other than the sling was in good order and properly used and operated and the load which fell was not jerked or mishandled. There was no evidence of external force striking the beam in the process of its descent, no evidence of negligence on the part of the crane operator or any of the other participants active in the loading operation.

Earlier in the day, and after the accident also, beams of the same general size and type were loaded in the same manner without falling from the sling; some smaller pieces of steel that were handled several pieces to a load had fallen prior to the accident.[1a] Since the accident (March, 1964) and to the time of trial (August, 1965) the same chain straps were in use loading steel onto other ships without incident; whether these operations involved "diving" the steel into the hold does not appear.

On the record the finding of fact by the trial court that the use of a chain sling was customary is not clearly erroneous. This leaves us with the problem whether under the undisputed evidence the chain sling, in the circumstances of this case, was unseaworthy as a matter of law. *Walker v. Harris*, 335 F. 2d 185 (5th Cir.), cert. denied, 379 U. S. 930, 85 S. Ct. 326, 13 L. ed. 2d 342 (1964); *Mills v. Mitsubishi Shipping Company*, 358 F. 2d 609 (5th Cir., 1966). We conclude it was unseaworthy and remand for assessment of damages.

The owner owes an absolute and non-delegable duty to provide a seaworthy vessel for the libelant working as a longshoreman thereon; however, the absolute duty

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[1a] All the steel was bridge, or structural steel. The 40 foot I-beams were for uprights, the shorter pieces for frames, in bridgework. The shorter pieces were described as "some ten feet and all like that." They slipped from the sling though loaded on a level plane instead of dived in. Obviously these pieces too had the capacity to maim or kill.

is only to furnish a vessel and equipment reasonably safe and fit for the purposes of intended use, and reasonably adequate to the place and occasion where used by direction of the owners.[2]

An improper method of handling cargo can amount to unseaworthiness.[3]

The courts have struggled to supply and put to use meaningful criteria to determine seaworthiness, tossed between the horns of liability without fault and fitness of a sufficiently high standard that the shipowner is relieved of liability.[4] Seaworthiness is a relative concept, depending in each instance upon the circumstances in which fitness is drawn into question.[5]

In *Vickers v. Tumey*, 290 F. 2d 426, 433, n. 5 (5th Cir. 1961) this Circuit approved this definition of seaworthiness: "Seaworthy . . . means that under the circumstances existing at the time of the injury, the vessel and her equipment . . . were reasonably fit to perform the duty of safety, which this vessel owed to human

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[2] *Morales v. City of Galveston*, 370 U. S. 165, 82 S. Ct. 1226, 8 L. Ed. 2d 412 (1962); *Texas Menhaden Company v. Johnson*, 332 F. 2d 527 (5th Cir., 1964); *Walker v. Harris*, supra; *Nunes v. Farrell Lines*, 227 F. 2d 619 (1st Cir., 1955); *Doucette v. Vincent*, 194 F. 2d 834 (1st Cir., 1952).

[3] *Morales v. City of Galveston*, supra; *Blassingill v. Waterman Steamship Corp.*, 336 F. 2d 367 (9th Cir., 1964); *Ballwanz v. Isthmian Lines, Inc.*, 319 F. 2d 457 (4th Cir.) cert. denied, 376 U. S. 970, 12 L. ed. 2d 84, 84 S. Ct. 1136 (1964). Cf. *Strika v. Netherlands Ministry of Traffic*, 185 F. 2d 555 (2nd Cir., 1950).

[4] "Unseaworthiness appears an unsatisfactory guide to conduct; it merely states the conclusion that under certain circumstances an injured seaman may recover from the shipowner." Note, The Doctrine of Unseaworthiness in the Lower Federal Courts, 76 *Harvard Law Review* 819, 829 (1963).

[5] *Walker v. Harris*, supra, 335 F. 2d at 191; *Walker v. Sinclair Refining Co.*, 320 F. 2d 302 (3rd Cir., 1963); *Shenker v. United States v. American Stevedores*, 322 F. 2d 622 (2d Cir. 1963), cert. denied, 376 U. S. 907, 11 L. ed. 2d 606, 84 S. Ct. 659 (1964).

beings aboard her, and to perform duties for which they were intended."

Reasonable suitability of ship and equipment is spelled out in terms of matching operating proficiency against anticipated operating conditions. *Mills v. Mitsubishi Shipping Company, supra.* The test is phrased as follows in *Walker v. Harris, supra,* 335 F. 2d at 191:

> "The subsidiary questions leading to ultimate conclusion of seaworthiness are therefore: what is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or its fitting) is seaworthy. If the answer is in the negative, then the vessel (or the fitting) is unseaworthy no matter how diligent, careful, or prudent the owner might have been. Mitchell v. Trawler Racer, Inc., 1960, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, 1960 AMC 1503."

The courts are, in the end, attempting to determine whether the seaman may perform his task aboard the ship with reasonable safety. *Sanford v. Caswell,* 200 F. 2d 830, 832 (5th Cir.), cert. denied 345 U. S. 940, 97 L. Ed. 1136, 73 S. Ct. 831 (1953); *Lester v. United States,* 234 F. 2d 625 (2d Cir.), cert. granted 352 U. S. 889, 1 L. Ed. 2d 85, 77 S. Ct. 130 (1956), appeal dismissed, 352 U. S. 983, 1 L. Ed. 2d 366, 77 S. Ct. 384 (1957); *Walker v. Sinclair Refining Co., supra.*

Articulating criteria to determine seaworthiness requires use of the language of negligence.[6] In the language

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[6] As the concept of seaworthiness has developed, this use—in a field of liability without fault—of words commonly applied to negligence actions, has vexed the courts.

In *Mitchell v. Trawler Racer, Inc.,* 362 U. S. 539, 4 L. Ed. 2d 941, 80 S. Ct. 926 (1960), a case of "transitory unseaworthiness." The Supreme Court rejected the test the Second Circuit had

of *Walker v. Harris, supra,* ". . . What is the [gear] to do. What are the hazards, the perils, the forces likely to be incurred," or, in the language of *Mills,* what are the "anticipated operating conditions." The force and hazard to be incurred—single, obvious and great—by

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applied of "reasonable care under the circumstances," saying: "[There] is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history." 326 U. S. at 549. However, *Trawler Racer's* own standards, paraphrased in *Walker v. Harris,* above, for determining seaworthiness necessarily embrace phraseology and analyses that concurrently exist in negligence law. The Supreme Court recognized this in *Morales,* supra: "[W]hat caused the injury in the present case . . . was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without." 370 U. S. at 171. The thrust of the dissent too in *Morales* is in terms of foreseeability.

In *Walker v. Harris,* supra, this Court too followed negligence approaches: "The question in this case boils down then to whether winds and seas of the kind actually encountered at this fateful moment were reasonably to be anticipated." . . ."[T]he familiar doctrine, so often invoked where vessels sink in calm waters, that sinking (or other failure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of, unseaworthiness." 335 F. 2d at 191, 193.

The answer we think is that if there is present a condition which is found to constitute unseaworthiness the carrier's care, or lack of it, has no play in insulating him from liability, or mitigating his faut, but in the initial determination—answering the threshold question whether the condition is unseaworthy as not reasonably fit—the court necessarily employs methods of analysis, and language, concurrently used in negligence cases. Some commentators propose adoption of negligence concepts into seaworthiness as a specific limitation on the expanding scope of the shipowner's liability for unseaworthiness. See The Supreme Court, 1961 Term, 76 *Harv. L. Rev.* 78, 93-95; Comment, Expanding the Warranty of Seaworthiness: Social Welfare or Maritime Disaster, 9 *Vill. L. Rev.* 422 (1964). Cf. Note, Risk Distribution and Unseaworthiness, 75 *Yale L. J.* 1174 (1966).

Distinctions which in common sense are relevant to a determination of seaworthiness do not become irrelevant because they are relevant also to negligence. Determining perils and forces that gear must reasonably be expected to encounter concerns foreseeability of likelihood of future events. Operating proficiency cannot be measured without regard to expected forces. "The lack of a hand rail may make a vessel sailing on the high seas unseaworthy

this cargo sling was the simple one of the force of gravity (or an external force, blow or mishandling) which, unless guarded against by operating proficiency, would cause the tilted beam to slip from the sling and fall and hurt someone. The force was not guarded against by libelee's gear, and libelant was injured.

The operational forces the sling was to incur were known. There is no problem whether libelee should or should not have anticipated or acted upon the degree of likelihood that certain forces and hazards might occur, such as storms which might be conceivable but not reasonably anticipable, or perils of the sea that are imaginable but not normally foreseeable. *Trawler Racer, supra.*

In many loading operations the forces and hazards to be incurred by the gear include the possibility of application of conditions and forces other than those inherent to the properly conducted movement itself—the winch

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while the lack of such a rail in a harbor boat operating in protected waters where hawsers are used in moving her about does not constitute unseaworthiness." 2 Norris, *The Law of Seamen*, § 612 (1962).

The nature and extent of the infringement which forces and hazards, as limited by operating proficiency, may have on the safety of the seaman and his place to work necessarily embrace consideration of the extent of risk of bodily harm. Broken glass on the rail of a fishing boat from normal operation is a clearer case of departure from reasonable fitness than slime on the same rail from normal operation. We do not, by referring to the usefulness of the methods of analysis and the language of negligence, imply that seaworthiness is to be limited to the confines of negligence as proposed by the law review commentators noted above, or that these analyses occupy the whole field of analysis, only that they are useful tools. See the discussion in *Ballwanz v. Isthmian Lines, Inc.*, 319 F. 2d 457 (4th Cir., 1963), where it was held error to repeatedly emphasize in the jury charge the words "reasonable", "reasonably" and "unreasonable" to such extent that they de-emphasized the affirmative aspects of seaworthiness and "diluted and adulterated the character of the warranty of seaworthiness" and were tantamount to suggesting that the jury must find negligence in order to hold the owner liable.

may jerk or suddenly stop and cause the sling to lose its draft of cargo, or the sling may be struck against a hatch. See *Smith v. M/V Gisna*, 362 F. 2d 164 (5th Cir., 1966). A new agent may be introduced, as the slime in *Trawler Racer* or the apple peel in *Poignant v. United States*, 225 F. 2d 595 (2d Cir., 1955), giving rise to "transitory unseaworthiness." But this accident occurred under the most antiseptic conditions possible. The winch was operated properly. The load struck nothing. The sling did not break. No new agency affected the sling. The loading operation was done without negligence. The sling simply did not perform its single assigned purpose of retaining the load without dropping it while moving it from point A to point B.

We turn to the effect of a sling that will not hold its draft upon the reasonable safety of the longshoreman's place of work. The effect in this case was a significant one, considering the size, weight, and bulk of the item carried, and the possibility of death or serious injury to those working underneath it as it was lifted into the air, moved and set down.

In addition, there was no place of safety to which the longshoremen could go. The libelant, who had retreated to the forward end of the hold when the gangwayman shouted a warning and was not underneath the square of the hatch, was nevertheless injured by the movement of beams already in the hold when they were struck by the falling beam.

Other circumstances will bring different results. In *Phipps v. Nederlandsebee Amerikaansebe*, S. M., 250 F. 2d 143 (9th Cir., 1958), the load in draft was, comparatively speaking, lighter and smaller, consisting of bundles of 3" x 6" timbers up to 40 feet long, and libelant had a place of safety to which to go and a warning of "heads up" with each load. In *Smith v. M/V Gisna, supra*, the

sling carrying rolls of newsprint struck the hatch coaming and the load popped out of the sling; the opinion does not reveal the extent to which this application of a force not inherent in the movement itself could be expected as part of the range of peril to be guarded against.

The gear was put to its primary use. Operational proficiency to meet expected forces needs to respond more clearly to the demands of primary use than to those of incidental use. Ordinarily failure of gear to perform will have its greatest impact upon the seaman's safety when he is deprived of the primary use, as a life raft which will not float, a steam valve which will not hold steam, or a cargo sling which will not retain its load.

Under the undisputed facts, the cargo sling failed to perform the purpose for which intended, while being used in a proper manner and for exactly the purpose intended, and affected only by forces and hazards known to the libelee and against which the sling did not protect, and these conditions seriously affected the safety of libelant's place to work—then the sling was not seaworthy. As this Court said in *Mills*:

> "But under no stretch of the imagination is a winch with shift lever reasonably fit if, at a critical point in the handling of the draft, the lever shakes so violently that the operator is thrown off the seat, is injured, cannot control the load, or all three."[7]

This case is akin to *Van Carpals v. S. S. American Harvester*, 297 F. 2d 9 (2d Cir.), cert. denied, 369 U. S. 865, 8 L. ed. 2d 84, 82 S. Ct. 1031 (1962). Libelant re-

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[7] See also *Texas Menhaden Company v. Johnson*, 332 F. 2d 527 (5th Cir., 1964). A seaman was injured when a crane suddenly bent in the middle and an attached line forced his hand against a spool. Affirming a finding that the crane was unseaworthy, this court commented: "[I]t is settled law that failure of a piece of equipment under proper and expected use is a sufficient predicate for a finding of unseaworthiness." 332 F. 2d at 528.

moved the bonnet from a steam valve and was burned by steam and hot water which gushed out under circumstances where the valve should have retained them. The District Court dismissed the libel on the ground of "unexplained accident." The Court of Appeals reversed holding the valve unseaworthy as a matter of law, saying:

> "We disagree and hold that under prevailing law the vessel must be held unseaworthy. Though the cause of the accident may be inexplicable, yet it, and the way it occurred, demonstrated that the valve was actually not in a safe condition for the work needed to be done upon it. The trial court believed that the independent tests made to double check the gauges and the fact that libelant saw no signs of pressure negated an unseaworthy condition. But we do not think that follows. The accident occurred; there was steam in the valve; and it erupted. These conceded physical facts imperatively required a finding of unfitness for the task in hand. Thus a conclusion of unseaworthiness should have been reached irrespective of the proofs tending to absolve the owner of negligence."
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> "Under the circumstances here disclosed of substantial injury from a failure of the ship's machinery, which demonstrates that it was unfit for its intended use, the breach of duty is clear."

It remanded the case for fixing of damages.

The steam valve, like the sling, did not perform its assigned function in the face of the exact forces it was intended and designed to encounter. A previous check on the steam line which showed no pressure, while obviating negligence, did not insulate the libelee from liability for the unseaworthy condition.[8]

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[8] The present case is analogous to unexplained sinking of a ship in calm waters under conditions that reasonably should be

Judge Dyer of this Court, while a District Judge, followed *Van Carpals* in *In Re Reids Petition*, 224 F. Supp. 241 (S. D. Fla., 1963). A winch was cranked to take in a sail, and when the operation was completed failed to hold its position and spun; the spinning crank struck libelant. No defect was shown. Judge Dyer held it unseaworthy.

In *Wm. Johnson and Company v. Johansen*, 86 F. 886 (5th Cir., 1898), the owner furnished two pieces of gear neither of which was unsound or deteriorated, a toggle and new, stiff and cumbersome rope, to rig a boatswain's chair on the mast. When used in combination the rope would not grip or bind sufficiently to hold the toggle nor would the half hitches and turns made around the toggle hold. The boatswain's chair fell with libelant in it. This Circuit, resting on negligence, a narrower scope of liability than unseaworthiness, held the owner liable.

In *Texas Menhaden, Van Carpals, Reid* and *Johnson* there was not shown to be a defect in the sense of a broken piece, stump or frayed end. In considering whether the owner has departed sufficiently far from conditions of absolute safety for the person and the place to work of the seaman that he is to be held liable for resulting injury, liability does not turn on particular modes or manners of departure from safety. Improper design or insufficient capacity can be as deadly as a broken or missing part. The seaman working underneath a cargo sling which will not hold its load is in a situation as unsafe as underneath a sling having a broken hook on the chain.

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anticipated (here, known conditions), which makes out a "classic case of unseaworthiness." *Walker v. Harris*, supra. Elsewhere this is referred to as a "presumption of unseaworthiness." *Tropical Marine Products, Inc., v. Birmingham Fire Insurance Company*, 247 F. 2d 116 (5th Cir.), cert. denied, 355 U. S. 903, 2 L. ed. 2d 260, 78 S. Ct. 331 (1957).

In *Vega v. The Malula*, 291 F. 2d 415 (5th Cir., 1961), a sheave came out of a block when a pin unaccountably slipped out. This Court held:

> *"The event occurred. The block failed. The block failed while being used for a normal expected purpose. That is, and has been, at least since Sierazki* [sic] *in 1947, a classic case of patent unseaworthiness.* The passage of time has but made the warranty of seaworthiness more awesome as it extends to gear used without regard to ownership and to transitory conditions. [Citations]. *How the pin happened to slip out is of no real legal significance.* No matter how much care was used either by the owner, the ship's crew, or the deceased crew member immediately responsible for its maintenance, *the failure of the block under normal expected use visits on the vessel owner an unremitting liability based on the breach of the absolute duty"* (Emphasis added).

See also *Alaska Steamship v. Peterson*, 205 F. 2d 478 (9th Cir.), affirmed per curiam 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1953). A block broke. There was no proof it was defective, or even of its condition before the accident. The court applied a doctrine stated to be similar to res ipsa loquitur; "If the block was being put to a proper use in a proper manner, as found by the district judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy."

In the case before us the District Court found the equipment used was customary in this operation and that the proof did not show what was customary was not reasonable, citing *Phipps, supra.*[9] The general practice

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[9] Much of the testimony of other loading operations related to handling steel of smaller sizes and weights, sometimes in bundles, and much of it was silent on whether the loads were slung

of the industry, while pertinent, is not the measure of prudence. "It [the industry] never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." Judge Learned Hand in *The T. J. Hooper,* 60 F. 2d 737, 740 (2d Cir., 1932).

While developing the testimony of customary gear both parties went fully into whether the sling should have been made of cables as contended by libelant, or of chains as claimed by libelee. Whether libelee should have used a better or safe appliance or gear is not the real question, but whether under all the circumstances the slings used were reasonably safe. *Doucette v. Vincent, supra.* The emphasis in testimony and decree on chains vs. cable (and use vs. non-use of chocks) indicates that parties and Court tended to consider the case governed by a choice between them. This is a misconception. Even if the Court had thought cables the best the defendant had no duty to supply the best, or the most modern, or perfect gear, so long as reasonably suitable. *Doucette v. Vincent, supra; Manhat v. United States,* 220 F. 2d 143 (2d Cir.), cert. denied, 349 U. S. 966, 99 L. Ed. 1288, 75 S. Ct. 900 (1955). That a cable sling was not determined the best, and that a chain sling was determined customary, do not of themselves make the chain sling seaworthy. Neither injured seamen nor courts are required to supply the design for gear sufficient to carry out its primary and assigned function without undue risk.

Prior and subsequent safe operation of gear was evidence whether the gear was reasonably fit for the use intended under the instant circumstances, but does not

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parallel to the surface or tilted to "dive" them into the hold. We do not find clearly erroneous the factual holdings of the court that the chain sling is customary; we find only that on the undisputed facts it did not attain the standards of seaworthiness.

alone determine the gear seaworthy; (were that so there never could be liability for "transitory unseaworthiness").[9a]

The owner is not obligated to furnish an accident-free ship. But the maxim proves little here.

> "It thus appears clear to us that the shipowner cannot wipe out this 'absolute' duty by saying that he does not know what caused the particular accident or suggesting in effect that it was an act of God." *Van Carpals v. S. S. American Harvester, supra,* 297 F. 2d at 11.

In any event, the injury to plaintiff did not occur from an unascertained cause or an act of God. The testimony, and the findings of the District Court, exclude all hypotheses of cause other than failure of the sling to perform its function.

The standards here articulated and applied do not make the owner an insurer or a guarantor against accidents in general, nor in particular against accidents while loading and unloading or accidents for which there is no exculpatory explanation. There are many relevant and limiting factors to be considered in weighing whether unseaworthiness exists. For example, the hazards may be unknown or not sufficiently foreseeable. The equipment may not be in use to perform its primary function or not in normal use. The hazard may not be sufficiently great that the departure from conditions of absolute safety is enough to impose liability. Failure may be caused or contributed to by external forces and the likelihood of their presence too slight. The standards and customs of the industry are pertinent, though like each other factor, not necessarily conclusive.

[9a] *Hroncich v. American President Lines, Ltd.,* 334 F. 2d 282 (3rd Cir., 1964).

The present case is of failure of equipment to carry out its assigned function while in normal use in a situation of high and known hazard and without the effect of any external force or event. On this record the equipment is unseaworthy, and custom does not suffice to insulate the owner from responsibility.

Reversed and Remanded for determination of damages.

Rives, Circuit Judge, concurring:

This case is close on its facts to our recent decision in *Smith v. M/V Gisna,* 1966, 362 F. 2d 164, where we affirmed under the clearly erroneous scope of review. In that case, however, the accident occurred when the load or the sling used in the loading operation struck the coaming thereby releasing the rolls of newsprint. That occurrence could be explained by the failure of the two winchmen to work together in properly lowering the load. In the present case the district judge found that there was no evidence of negligence on the part of the crane operator. There appears to be no evidence of negligence of any of the longshoremen in the steepness of the angle at which the beam was placed for loading or otherwise. Compare *Ferrante v. Swedish American Lines,* 3 Cir. 1964, 331 F. 2d 571. There is simply no explanation for the accident, except either the choice of an improper method of loading[1] or the unfitness of the sling used to lower the beam. Under the principles established in the Second Circuit and in this Circuit,[2] I agree that the necessary conclusion is that unseaworthiness of the ship caused the injury to Marshall. I therefore concur.

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[1] Which would amount to unseaworthiness. See cases cited in footnote 3 to opinion.

[2] Van Carpals v. The SS American Harvester, 1961, 297 F. 2d 9; Walker v. Harris, 1964, 355 F. 2d 185; Mills v. Mitsubishi Shipping Co., 1966, 358 F. 2d 609.

Gewin, Circuit Judge, Dissenting:

Admittedly this is an appealing case in which to find some theory by which the libelant can recover for injuries sustained during what, in the normal course of events, should have been a routine and incident free loading operation. That the injuries resulted from the failure of a cargo sling to hold its cargo makes the libelant's case all the more attractive. Nevertheless, on the basis of the district court's findings and the record before us, I am unable to join in the conclusion of the majority that as a matter of law the use of chain slings rendered the ship unseaworthy. In reaching that conclusion the majority fails to take cognizance of the vital factual differences which distinguish this case from those upon which it relies. Its decision is tantamount to holding that if an accident occurs which can not be satisfactorily attributed to an exculpatory cause, the ship is unseaworthy as a matter of law. While disclaiming that it is establishing such a standard, the very factors which it contends limit the scope of the rationale are in themselves exculpatory causes or explanations. Such a result is not sanctioned by decisional law and, in my opinion, renders a shipowner a virtual insurer or guarantor of the safety of seamen employed on its vessel in all circumstances. *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 550, 4 L. ed. 2d 941, 948-49 (1960); *Morales v. City of Galveston*, 370 U. S. 165, 8 L. ed. 2d 412 (1962).

The majority recognizes that ". . . the defendant had no duty to supply the best, or the most modern, or perfect gear so long as reasonably suitable." Nevertheless, it is concluded that because the sling in question failed to perform its assigned task on the occasion in question the ship was unseaworthy. Thus, the majority has decided that the district court was clearly erroneous when it found, admittedly by implication, that the sling was reasonably fit for its intended purposes. In support of its

position, the opinion relies upon several cases which found unseaworthiness because of the unexplained failure of a piece of equipment to function properly. However, in each of those cases a defect in the equipment or in its design is easily inferrable from the facts of the case. Thus, in *Mills v. Mitsubishi Shipping Co.*, 358 F. 2d 609 (5 Cir. 1966) the violent shaking of the winch lever described as a malfunction, was clearly attributable to a defect in the mechanism and in *Texas Menhaden Co. v. Johnson*, 332 F. 2d 527 (5 Cir. 1964) the bending of the crane indicated a defect in the crane itself. Again, in *Van Carpals v. S. S. American Harvester*, 297 F. 2d 9 (2 Cir. 1962) it was readily inferrable that steam would not have escaped from the valve if it was not defective. The opinion states "the valve was actually not in a safe condition." Likewise, *In Re Reids Petition*, 224 F. Supp. 241 (S. D. Fla. 1963) involved a winch which would not hold. Here again, it was obvious that the equipment itself was defective.

No defect in the equipment here involved was shown by the libelant and none is inferrable from the facts disclosed in the record. Nor is this a case in which there is or could be an allegation that the equipment was improperly designed. The design of the equipment was not an issue before the district court. We are dealing with a simple cargo sling and not some complex piece of mechanical equipment requiring scientific and engineering skills in its design. Thus, those cases upon which the majority relies are clearly distinguishable. Similarly, the cases which have established that a vessel may be rendered unseaworthy as a result of cargo handling operations have predicated the finding of unseaworthiness on the improper method of stowing or loading the cargo. See, e. g., *Blassingwill v. Waterman's Steamship Corp.*, 336 F. 2d 367 (9 Cir. 1964); *Ferrante v. Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964). Again, no

such allegation was made in this case, and there was no showing that the cargo was improperly handled. Rather, we are presented with a complaint which alleges that the equipment used to load heavy steel beams was inadequate to the task attempted, and that as a result of using this inadequate and unseaworthy equipment the libelant was severely injured. After considering conflicting evidence from witnesses who appeared in open court, the district court found that the use of a chain sling was customary in the industry and that such use was not unreasonable. The evidence showed that both chain and cable slings were used in handling steel, and there was opinion testimony that the chains were to be preferred over cable for heavy steel such as was involved here.

Both the libelant and the respondent presented substantial and conflicting evidence in support of their respective contentions. It was for the district court to make the credibility determinations necessary to resolve the factual disputes. Our standard of review precludes us from substituting our judgment for that of the district court if there is substantial evidence to support its conclusions. *McAllister v. United States,* 348 U. S. 19, 99 L. ed. 20 (1954). I can not conclude that the factual findings of the district court are clearly erroneous, *Smith v. M/V Gisna,* 362 F. 2d 164 (5 Cir. 1966), or that its legal conclusion that the ship was seaworthy is not supported by the facts found.

Although the use of equipment that is customary and usual in an industry may nevertheless fail to meet the standards of seaworthiness, *The T. J. Hooper,* 60 F. 2d 737, 740 (2 Cir. 1932), the record before us will not support a conclusion that as a matter of law the use of the chain slings failed to meet the standards of seaworthiness. Both chain slings and cable straps had been used at the State Docks, and aside from the accident which gave rise to this suit, the evidence showed no other

incidents where comparable steel cargo had slipped. Admittedly, some comparatively light, small pieces of steel had fallen on the day of the accident in question. There was a conflict in the evidence as to what caused the small steel to fall. The fact that there was some evidence that chains should not have been used for loading pre-bundled small steel pieces is certainly not conclusive on the issue of whether steel chains were unseaworthy when handling large, heavy steel members.[1] The difficulties presented by the weight and size of the large "I" beams could reasonably require equipment substantially different from that needed to handle many small pieces of steel which had been bundled together. The testimony indicated that heavy steel of the type here involved was difficult to load and the possibility that it might slip was well known, regardless of the equipment used.

In holding that the vessel was unseaworthy because the chain slings failed to perform the operation for which they were designed, the majority is confusing situations in which equipment, though operating as designed, nevertheless causes an injury, and circumstances in which equipment, as a result of failing to perform its function as intended and for which it was designed, causes an injury. Those cases involving defective equipment belong to the latter class, and unseaworthiness follows inexorably from the failure to operate properly. See, e. g., *Mills, supra.* The loading of cargo with equipment that is usual and customary and which is operating as designed free of any defect, however, falls within the former class of situations and the mere occurrence of

[1] There was some testimony which indicated that the strapping used to hold the small bundles of steel together broke causing the steel to fall. If such was the case, the evidence that the smaller steel fell has even less probative value in establishing that the chains were unseaworthy when used to load the massive "I" beams in question.

an accident with resulting injury does not imply unseaworthiness. The transitory carriage of large, heavy steel beams necessary to load a vessel involves, by the very nature of the operation, the continual risk of the steel slipping from its cargo sling and falling. It is a risk which is inherent in the operation, and though it can and must be minimized there was no showing that it can be entirely avoided. Thus, by finding unseaworthiness as a matter of law, this Court is holding that the ship is required to provide a means of loading a vessel which will insure that there can be no slippage of cargo during loading, a standard much greater than reasonable fitness. Since the test for seaworthiness is not whether the equipment is sufficient to prevent injury under all circumstances, but whether it is reasonably fit for its intended purposes, the mere occurrence of a single incident in which a steel beam fell from the chain sling is not, in light of the nature of the risk involved and the lack of any demonstrable or inferrable defect, sufficient to render the vessel unseaworthy as a matter of law. This Court noted in *Jefferson v. Taiyo Katum, K. K.*, 310 F. 2d 583 (5 Cir. 1962) that "It will be a rare case where the issue of seaworthiness is the proximate cause of an injury is to be resolved for or against a shipowner as a matter of law." Surely this is not such a case.

I respectfully dissent.

APPENDIX C.

United States Court of Appeals
For the Fifth Circuit.

October Term, 1966.

No. 23295.

D. C. Docket No. Adm. 3112.

John L. Marshall,
Appellant,

versus

Ove Skou Rederi A/S and the SS Birgitte Skou, Her Engines, Hull, Tackle, Cargo and Appurtenances Thereof,
Appellees,

The Travelers Insurance Company,
Intervenor.

Appeal from the United States District Court for the Southern District of Alabama.

Before Rives, Gewin and Godbold, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for determination of damages, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Ove Skou Rederi A/S, and the SS Birgitte Skou, her engines, hull, tackle, cargo, and appurtenances thereof, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 15, 1967.

Rives, Circuit Judge, specially concurs.

Gewin, Circuit Judge, dissents.

Issued as Mandate:

APPENDIX D.

United States Court of Appeals
For the Fifth Circuit.

John L. Marshall, Appellant,

versus

Ove Skou Rederi A/S and the SS Birgitte Skou, Her Engines, Hull, Tackle, Cargo and Appurtenances Thereof, Appellees. } No. 23295.

On Consideration of the Application of the Appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 5th day of June, 1967.

/s/ John C. Godbold,
United States Circuit Judge.

(Original Filed—June 6, 1967.)